

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Construction Requirements for
Commercial Wide-Area 800 MHz
Licensees Pursuant to *Fresno Mobile
Radio, Inc. v. FCC*

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)
) PR Docket No. 93-144
) FCC 00-95
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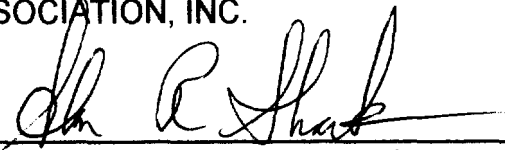
To: The Commission

COMMENTS of the
AMERICAN MOBILE TELECOMMUNICATIONS ASSOCIATION, INC.

Respectfully submitted,

AMERICAN MOBILE TELECOMMUNICATIONS
ASSOCIATION, INC.

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The American Mobile Telecommunications Association, Inc. ("AMTA" or "Association"), in response to the Public Notice released by the Federal Communications Commission ("FCC" or "Commission") on March 10, 2000,¹ and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. §1.415, respectfully submits its comments regarding appropriate construction requirements for commercial wide-area 800 MHz licensees operating on non-SMR channels through inter-category sharing. For the reasons detailed below, AMTA recommends that the Commission adopt 800 MHz construction obligations for these frequencies that are consistent with those applicable to SMR channels in wide-area systems and to licensees of geographically-defined 800 MHz systems.

I. Introduction

1. AMTA is a nationwide, non-profit trade association dedicated to the interests of the specialized wireless communications industry. The Association's members include trunked and conventional 800 MHz and 900 MHz Specialized Mobile Radio (SMR) service operators, licensees of wide-area and geographic-area licensed systems in the 220 MHz, 800 MHz and 900 MHz frequency bands, and other commercial service providers operating in the 220 MHz and 450-512 MHz frequency bands. These members provide commercial wireless service throughout the country. They include virtually all 800 MHz licensees of both Economic Area ("EA") geographic and site-specific wide-area systems. Thus the Association and its members have a direct, distinct interest in the outcome of this proceeding.

¹ Commission Requests Comment, Pursuant to *Fresno Mobile Radio, Inc. v. FCC*, on the Construction Requirements for Commercial, Wide-area 800 MHz Licensees Operating on Non-SMR Channels through Inter-category Sharing, *Public Notice*, FCC 00-95, ___ FCC Rcd ___ (rel. March 10, 2000)("PN", "Notice").

II. Background

2. The issue of non-SMR channels included in 800 MHz wide-area systems remains from the FCC's response to the order by the United States Court of Appeals for the District of Columbia Circuit in *Fresno Mobile Radio, Inc. et al. v. Federal Communications Commission*.² That decision stated that the Commission "failed to articulate a satisfactory explanation for its refusal to extend the Interim Coverage Requirement to wide-area SMR licensees," and remanded the issue to the agency.³

3. In its *Memorandum Opinion and Order on Remand* in this docket,⁴ the Commission determined that incumbent 800 MHz wide-area licensees who were within their construction periods at the time of the *Fresno* decision could choose either their original construction deadlines or requirements similar to those given to EA licensees in the 800 MHz band. However, the FCC carved out non-SMR channels in these systems from its decision in the Remand Order.⁵ The instant Notice represents the Commission's return to this issue.

III. Discussion

4. Wide-area licensees obtained their authorizations first via waiver, then pursuant to Section 90.629 of the Commission's Rules, 47 C.F.R. § 90.629, providing extended implementation, or "slow growth" construction options. This rule section applied first to

² *Fresno Mobile Radio, Inc., et al. v. Federal Communications Commission*, 165 F. 3d 965 (D.C. Cir., Feb. 5, 1999)(*Fresno*).

³ *Id.* at 970.

⁴ *Memorandum Opinion and Order on Remand*, PR Docket No. 93-144, FCC 99-399, 65 Fed. Reg. 7749, released December 23, 1999 ("Remand Order").

⁵ *Id.* at ¶ 20.

channels in the Business, Industrial/Land Transportation, Public Safety and General Category channel pools, and was only extended to SMR Category channels in 1993.⁶ Thus, extended construction deadlines were available for non-SMR Category channels throughout the period when these channels were added to wide-area SMR systems through inter-category sharing.

5. The extended implementation rule was used in the encumbered 800 MHz band to move from site-specific licensing to more regional, footprint-based geographic systems. As AMTA noted in its original comments in this matter, some number of extended implementation grants were made, generally on the basis either that the applicant had an already-constructed footprint over which it intended to overlay a geographically defined, more efficient technology or that it held unconstructed stations that required additional time to implement a technically advanced system.⁷ Due to the scarcity of available 800 MHz frequencies and the inter-category sharing rules in effect at the time of these grants, most of them included SMR Category, General Category, and, in many cases, Business or Industrial/Land Transportation pool frequencies.

6. As part of the 1993 Omnibus Budget Reconciliation Act, Congress mandated consistent regulatory treatment for segments of the commercial wireless industry.⁸ The

⁶ Amendment of Part 90 of the Commission's Rules Governing Extended Implementation Periods, *Report and Order*, PR Docket No. 92-210, FCC 93-256, ____ FCC Rcd ____, released June 9, 1993.

⁷ Construction Requirements for Commercial Wide-Area 800 MHz Licensees Pursuant to *Fresno Mobile Radio, Inc., v. FCC*, PR Docket No. 93-144, DA 99-974, Comments of the American Mobile Telecommunications Association, Inc., submitted July 12, 1999 ("AMTA Comments"), at 4.

⁸ Pub. L. No 103-66 ¶ 6002, 107 Stat. 312, 397 (1993)("Budget Act").

FCC's proceedings stemming from the Budget Act determined that all portions of the CMRS industry were actually, or potentially, competitive with one another. While the Commission's treatment of the 800 MHz band has proceeded slowly over the past six years, it has not wavered from the requirement that similar systems, such as wide-area SMR, PCS and cellular systems, must receive comparable regulatory treatment. Regulatory requirements such as RF emission standards, regulatory fees, universal service support and wireless resale requirements have not differed based on specific frequencies included in these systems.

7. While preparing to award geographic overlay licenses in the 800 MHz band, the FCC stopped granting wide-area, extended implementation authorizations. It also required previously-granted wide-area licensees to re-justify their extended construction periods, eventually issuing a new, all-encompassing construction deadline for "re-justified" systems.⁹ That decision did not differentiate between SMR Category and non-SMR channels in these systems. All channels in each system awarded through extended implementation grant received the same construction deadline.

8. In deciding not to include non-SMR channels in the relief provided, the Remand Order stated that the *Fresno* court's decision "specifically involves SMR frequencies."¹⁰ This is incorrect. The court's decision, in fact, made no reference to SMR versus non-SMR Category channels included in incumbent 800 MHz wide-area SMR systems. Rather, the court declined to differentiate between incumbent wide-area systems and auctioned

⁹ Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR systems in the 800 MHz Frequency Band, *Memorandum Opinion and Order on Reconsideration*, 12 FCC Rcd. 9972 (1997).

¹⁰ Remand Order at ¶ 20.

geographic licenses although the Southern Company wide-area system, to which the court's relief was granted specifically, includes significant numbers of non-SMR Category channels.

9. Most commenters in the initial remand proceeding, including AMTA, did not raise the issue of non-SMR Category channels. In the Association's case, this was due to the fact that no differentiation had been made previously among channels included in wide-area systems, other than that of adhering to the technical rules associated with the original pool. AMTA, and the Association assumes other commenters, reached the reasonable conclusion that all frequencies properly licensed to a wide-area SMR system under the FCC's Rules became a part of that system and subject to consistent regulatory treatment. AMTA urges the Commission to reinstate such consistent treatment with regard to construction requirements, and in all areas of regulation.

IV. Conclusion

10. AMTA asks that the FCC establish parallel construction requirements for non-SMR frequencies as have been provided for SMR Category frequencies included in remaining incumbent wide-area systems, and that the Commission proceed expeditiously to adopt rules consistent with the Association's comments herein.

CERTIFICATE OF SERVICE

I, Linda J. Evans, a secretary in the law office of Lukas, Nace, Gutierrez & Sachs, hereby certify that I have, on this March 27, 2000 caused to be mailed, first-class, postage prepaid, a copy of the foregoing Comments to the following:

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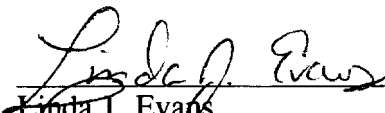
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